

Friedmann

EXHIBIT A

In The Matter Of:

In Re Sears

Holdings

Kunal Kamlani

June 20, 2019



Min-U-Script® with Word Index

1
2 UNITED STATES BANKRUPTCY COURT
3 SOUTHERN DISTRICT OF NEW YORK
4 Chapter 11 - Case No. 18-23538 (RDD)

5 -----
6 In Re:
7 SEARS HOLDINGS CORPORATION, et al.,
8 Debtors.
9 -----

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11
12 DEPOSITION OF KUNAL KAMLANI

13
14 Thursday, June 20, 2019

15 10:00 a.m.
16
17
18
19
20

21 Reported by:
22 Joan Ferrara, RMR, FCRR
23 Job No. 2019-72624a
24
25

1
2 June 20, 2019

3 10:00 a.m.

4 New York, New York
5
6

7 Deposition of KUNAL KAMLANI, held
8 at the offices of Cleary Gottlieb Steen &
9 Hamilton, 450 Park Avenue, New York, New
10 York, before Joan Ferrara, a Registered
11 Merit Reporter, Federal Certified Realtime
12 Reporter and Notary Public of the State of
13 New York.
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A P P E A R A N C E S:

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A P P E A R A N C E S: (Continued)

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Corporation, et al.:

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(Continued)

A P P E A R A N C E S: (Continued)

ALSO PRESENT:

EMILY MORROW, Cleary Summer

Associate

GABRIELLE KANTER, Weil Summer

Associate

BRIAN GRIFFITH, M-III

JOSEPH FRANTZ, M-III

1

2 K U N A L K A M L A N I,

3 called as a witness, having been duly

4 sworn by a Notary Public, was examined

5 and testified as follows:

6 EXAMINATION BY

7 MS. CROZIER:

8 Q. Good morning, Mr. Kamlani.

9 A. Good morning.

10 Q. You met me a few minutes ago. My

11 name is Jennifer Crozier. I'm from Weil

12 Gotshal & Manges, and I represent the

13 Debtors in connection with these cases.

14 Thank you for your time this morning.

15 Now, I know you've been deposed

16 before because I actually sat in on your

17 January deposition in connection with these

18 cases, but nevertheless I'm going to run

19 through some of the deposition ground

20 rules.

21 Okay?

22 A. Perfect.

23 Q. So first, you've just been sworn

24 in and so you understand that you are to

25 tell the truth, the whole truth and nothing

1 K. Kamlani
2 below to the definition of "other
3 payables," that definition reads as
4 follows:

5 "Other payables shall mean the
6 accounts payable set forth on Schedule
7 1.1G."

8 Do you see that?

9 A. I do.

10 Q. Would you agree with me,
11 Mr. Kamlani, that ordered inventory and
12 other payables are defined separately in
13 the APA?

14 MR. LIMAN: I'm going to object
15 to the extent it calls for legal
16 conclusions.

17 You can go ahead.

18 A. Can we look at Schedules 1.1G
19 and -- what was the other one, 1.1F, was
20 it?

21 Q. F. We're going to look at those
22 schedules in a moment. Right now I'm
23 asking you about page 24 of the Asset
24 Purchase Agreement. I'm asking you whether
25 ordered inventory and other payables are

1 K. Kamrani

2 A. If you're asking me are these two
3 separate sentences in the APA, the answer
4 is yes, because to the naked eye they're
5 two separate sentence.

6 If you're asking me are they two
7 different concepts, they are not.

8 Q. That's not what I'm asking you.

9 MS. CROZIER: So objection to the
10 nonresponsive portion of that answer.

11 A. What was the responsive portion?

12 Q. To the naked eye, Mr. Kamrani,
13 you would also agree that these are two
14 separate definitions.

15 A. They are two separate sentences
16 on the page, yes.

17 Q. And two separate definitions as
18 well, correct?

19 A. Yes.

20 MS. CROZIER: Mark this Kamrani
21 Exhibit 3, please.

22 (Kamlani Exhibit 3, Schedule
23 1.1F, marked for identification, as of
24 this date.)

25 BY MS. CROZIER:

1 K. Kamlani

2 A. Correct.

3 Q. And if you will flip the page on
4 that exhibit, you will see Annex 9.

5 Do you see that?

6 A. I do.

7 Q. Can you read Annex 9 to me,
8 please?

9 A. I'm assuming it's Annex 9. It
10 doesn't say Annex 9.

11 Q. I'll represent to you --

12 A. I'll take your word for it.

13 Q. Fair.

14 A. It says, "Assumed accounts
15 payable \$166 million," which is largely the
16 same number on 1.1F.

17 Q. Now, I would like you to set
18 Schedule 1.1G and 1.1F next to one another,
19 if you would.

20 Do you agree, Mr. Kamlani, that
21 these are two separate schedules appended
22 to the APA?

23 A. They are.

24 Q. And would you also agree,
25 Mr. Kamlani, that 166.0 is a different

1 K. Kamlani

2 number than \$166,557,621?

3 A. I would agree with you that those
4 are two different numbers.

5 Q. You can set those aside.

6 Now, by January 11th,
7 Mr. Kamlani, you understood that the
8 Debtors were asking Transform to assume up
9 to \$166 million of accounts payable in
10 connection with the APA, correct?

11 A. No.

12 Q. Mr. Kamlani, will you pull your
13 deposition transcript out again, please.

14 A. Let me rephrase the answer.
15 Why don't you ask the question
16 again?

17 Q. By January 11th, you understood
18 that the Debtors were asking Transform to
19 assume up to \$166 million accounts payable
20 in connection with the APA?

21 A. All right, so without speaking to
22 the specific day, the Debtors were asking
23 for us to assume lots of liabilities, of
24 which that was one of them, at a point in
25 time very well could have been the day you

1 K. Kamlani

2 mentioned.

3 Q. Okay. Thank you. You can set
4 the deposition transcript aside.

5 And you, yourself, understood
6 that the Debtors wanted Transform to assume
7 those accounts payables precisely because
8 the Debtors had administrative solvency
9 concerns, correct?

10 MR. LIMAN: Objection and vague.

11 A. The Debtors had lots of concerns.
12 What I was specifically told by Bill
13 Transier was that the Debtors did not want
14 to assume the risk of holding on to assets
15 post close that may or may not cover
16 liabilities to the extent they held those
17 liabilities.

18 Q. And you also understood,
19 Mr. Kamlani, that the Debtors had concerns
20 about the magnitude of the liabilities with
21 which they might be left after the proposed
22 sale transaction, correct?

23 MR. LIMAN: Objection. Vague.

24 A. They were concerned that the
25 assets they had may not be able to cover

1 K. Kamlani

2 MS. CROZIER: Exhibit 5, can you
3 mark this as 5, please.

4 (Kamlani Exhibit 5, E-mail dated
5 1/11/19, marked for identification, as
6 of this date.)

7 BY MS. CROZIER:

8 Q. Mr. Kamlani, I'm showing you what
9 I've marked Kamlani Exhibit 5, which is a
10 January 11, 2019 e-mail from Rajat Prakash
11 to a number of individuals, including
12 Mr. Lampert, Mr. Riecker and yourself,
13 correct?

14 A. Yes, there are a number of
15 individuals on it, including the ones that
16 you mentioned, yes.

17 Q. And the subject of the e-mail is
18 daily cash flow forecast 1/11/2019,
19 correct?

20 A. Correct.

21 Q. And you received these daily cash
22 flow forecasts daily in the post-petition
23 period, correct?

24 A. Yes.

25 Q. Now, I'd like to direct your

1 K. Kamlani

2 attention to the key callouts section of
3 the e-mail.

4 Do you see that?

5 A. I do.

6 Q. And look at the very last black
7 bullet in that section.

8 Do you see that?

9 A. I do.

10 Q. It reads, "The total AP balance
11 beginning 1/11/2019 is" -- merch 123.9
12 million and non-merch 50.6 million.

13 Do you see that?

14 A. I do.

15 Q. Now merchandise -- to be clear,
16 merch refers to merchandise-related
17 accounts payable, correct?

18 A. Yes.

19 Q. And you understood that on
20 January 11, 2019?

21 A. I did.

22 Q. And non-merch refers to
23 non-merchandise-related accounts payable?

24 A. Yes.

25 Q. And you understood that on

1 K. Kamlani

2 January 11, 2019 as well, correct?

3 A. Yes.

4 Q. And so you would agree with me
5 then, Mr. Kamlani, that as of January 11,
6 2019, the accounts payable that the Debtors
7 were asking Transform to assume was
8 composed of a portion of merchandise
9 related accounts payable and a portion of
10 non-merchandise-related accounts payable,
11 correct?

12 A. Not from this document. There is
13 nothing in this document at any time then
14 or now that informed my thinking that
15 that's what the Debtors were asking us to
16 assume. The Debtors were asking us to
17 assume in January, pursuant to the
18 conversation we just had, to assume a
19 series of liabilities including accounts
20 payable. This document has nothing to do
21 with that in my mind.

22 Q. So you've just testified that in
23 January the Debtors were asking you to
24 assume a series of liabilities, including
25 accounts payable, correct?

1 K. Kamlani

2 A. Correct.

3 Q. And here in the key call-out
4 section of the daily cash flow forecast,
5 Mr. Prakash divides the total AP balance
6 into 123.9 million of merchandise-related
7 accounts payable and \$50.6 million of
8 non-merchandise-related accounts payable,
9 correct?

10 A. Yes.

11 Q. Now, merchandise --
12 non-merchandise-related accounts payable
13 constitutes payables associated with
14 services rendered to the company, but for
15 which the company has not yet paid, is that
16 correct?

17 A. Yes.

18 Q. Isn't it true, Mr. Kamlani, that
19 as of mid January, you understood that the
20 \$166 million of accounts payable that the
21 Debtors had asked the buyer to assume were
22 related to both merchandise and
23 non-merchandise-related accounts payable?

24 A. That was their request, yes.

25 That was their ask. It's not ultimately

1 K. Kamlani

2 what was agreed to, but it was their ask.

3 MS. CROZIER: Move to strike the
4 nonresponsive portion of that answer.

5 Q. Now notwithstanding everything we
6 have just discussed, Mr. Kamlani --

7 A. Can I just ask my lawyer a
8 question for a minute since you haven't
9 asked a question?

10 MR. LIMAN: Yes. There's no
11 question pending.

12 THE WITNESS: Well, I can ask the
13 question to both. If I provide an
14 answer, it's totally fine for them to
15 strike and keep the first three words
16 and strike the last four words? I
17 mean, how does this work?

18 MR. LIMAN: That's up to the
19 judge. Give your complete answer.
20 Let them make whatever noises that
21 they want to make. That's up to them.
22 It's their time if they want to put
23 stuff on the record.

24 THE WITNESS: That's fine.

25 A. I apologize.

1 K. Kamlani

2 A. I have no idea what -- well,
3 according to this schedule, yes, as of
4 January 7th, this is what they had in
5 order -- correct, that would be accurate.

6 Q. Okay.

7 And were Transform to take
8 delivery of all of this ordered inventory
9 and only assume payment obligations with
10 respect to \$166 million of it, that would
11 leave the Debtors with a \$557,621 bill
12 representing zero assets, correct?

13 A. It would.

14 Q. And that wouldn't help with
15 administrative solvency concerns, would it,
16 Mr. Kamlani?

17 A. In that very specific example,
18 no, it would not.

19 Q. Mr. Kamlani, because the buyer
20 disputes that it's obligated to assume both
21 up to \$166 million in respect of other
22 payables and all payment obligations with
23 respect to ordered inventory, has it ceased
24 paying accounts payable that it believes to
25 be the Debtors' responsibility?

1 K. Kamlani

2 dollars, tens of millions of dollars.

3 So the underlying assumption that
4 the forecast was going to be right and
5 something had to be managed in order to hit
6 a number is not necessarily correct when
7 every budget they put out every week was
8 beaten by tens of millions of dollars, week
9 after week after week.

10 Q. And your testimony, sitting here
11 today now, is you had no idea how they were
12 doing that?

13 A. I have an idea of how they were
14 doing that. My idea of how they were doing
15 that was if they thought they might spend
16 \$50 million, you put out a budget that says
17 you're going to spend \$80 million and you
18 spend \$50 million and you come ahead by \$30
19 million.

20 Q. You understood, Mr. Kamlani, that
21 the Debtors were managing inventory and
22 payments in order to meet that \$850 million
23 closing condition, didn't you?

24 A. Yes.

25 MS. CROZIER: Can you mark this

1 K. Kamlani

2 definition of ordered inventory in the
3 Asset Purchase Agreement is in part that
4 the sellers have not taken title or
5 delivery to that inventory prior to the
6 closing date?

7 A. Yes.

8 Q. So you would agree that ordered
9 inventory within the meaning of the APA is
10 not an asset, correct?

11 A. Correct. It's nothing.

12 Q. Are you generally familiar,
13 Mr. Kamlani, with the adequate assurance
14 deposit that was put in place at the outset
15 of these Chapter 11 cases to provide
16 adequate assurance to the Debtors' utility
17 providers?

18 MR. LIMAN: Objection to form.

19 A. At a very, very high level, I'm
20 familiar with the Debtors put deposits with
21 utility companies to make sure that utility
22 companies continued to provide services to
23 the business.

24 Q. And do you also understand that
25 in the days before closing, the Debtors

1 K. Kamlani
2 to figure out what actually exists versus
3 something that doesn't exist. And what we
4 found is there is a large part of
5 receivables on that schedule that, in fact,
6 do not exist at all. Again, different from
7 a valuation exercise.

8 Q. You received a list of the
9 specified receivables that debtors would
10 deliver at closing as early as January 6,
11 2019, correct, Mr. Kamlani?

12 A. I can't speak to the specific
13 date, but I'm sure on that timeframe.

14 Q. And the buyer had an opportunity
15 to diligence those specified receivables,
16 isn't that right?

17 A. We did.

18 Q. And at the time the Debtors
19 estimated -- the Debtors' estimate of
20 likelihood of recovery with respect to
21 those receivables was in the aggregate 44
22 percent.

23 Do you recall that?

24 A. That sounds about right.

25 Q. And subsequent to that, the buyer

1 K. Kamlani

2 developed its own estimate of the
3 percentage of those specified receivables
4 that the buyer was likely to recover in the
5 aggregate, isn't that right?

6 A. Yes.

7 Q. And what was that estimate? What
8 was the buyer's estimate?

9 A. Depending on the timeframe, it
10 was in the 60 to 75 percent range.

11 Q. And how much has the buyer
12 recovered to date with respect to the
13 specified receivables?

14 A. Roughly \$80 million.

15 Q. And why do you say "roughly"?

16 A. Because I don't have the number
17 out to a decimal off the top of my head.

18 Q. Mr. Kamlani, the buyer understood
19 that there was a risk associated with
20 recovering the specified receivables before
21 it execute the APA, correct?

22 A. We recognized that there was a
23 risk with not being able to collect
24 something that existed. We did not sign up
25 for the risk to pay for something that did

1 K. Kamlani

2 fruition, that they only sold the assets
3 for, let's say, 50-cents on the dollar,
4 then they would have had an administrative
5 solvency problem to the tune of \$88
6 million.

7 Based on the deal that we struck,
8 the excess liability over the assets is
9 \$526,000. Having said that, based on the
10 way we've always done business, to the
11 extent we actually received \$166.5 million
12 of assets, we certainly would have paid the
13 estate for the incremental \$500,000.

14 MR. LIMAN: Okay. Nothing
15 further. Thank you for your time.

16 MS. CROZIER: I have one, maybe
17 two additional follow-up questions.

18 FURTHER EXAMINATION

19 BY MS. CROZIER:

20 Q. Mr. Kamlani, you testified
21 earlier that ordered inventory within the
22 meaning of the APA was inventory to which
23 the sellers had not taken title or
24 delivery, correct?

25 A. Correct.

1 K. Kamlani

2 Q. The Debtors could have canceled
3 those orders at any time, couldn't they
4 have?

5 A. As long as they were operating in
6 the ordinary course, yes.

7 MS. CROZIER: That's all I have.

8 Thank you very much.

9 THE WITNESS: Thank you.

10 (Time noted: 11:51 a.m.)

11

12

13

14

KUNAL KAMLANI

15

16 Subscribed and sworn to before me

17 this ____ day of _____, 2019.

18

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25

C E R T I F I C A T E

STATE OF NEW YORK)

: ss.

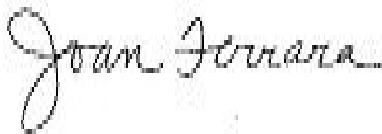
COUNTY OF NEW YORK)

I, Joan Ferrara, a Notary Public
within and for the State of New York,
do hereby certify:

That KUNAL KAMLANI, the witness
whose deposition is hereinbefore set
forth, was duly sworn by me and that
such deposition is a true record of the
testimony given by the witness.

I further certify that I am not
related to any of the parties to this
action by blood or marriage, and that I
am in no way interested in the outcome
of this matter.

IN WITNESS WHEREOF, I have
hereunto set my hand this 20th day of
June, 2019.



Joan Ferrara

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----- I N D E X -----

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----- EXHIBITS -----

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DEPOSITION ERRATA SHEET

Case Caption: In Re: SEARS HOLDINGS
CORPORATION, et al.

DECLARATION UNDER PENALTY OF PERJURY

I declare under penalty of perjury
that I have read the entire transcript of my
Deposition taken in the captioned matter or
the same has been read to me, and the same is
true and accurate, save and except for
changes and/or corrections, if any, as
indicated by me on the DEPOSITION ERRATA
SHEET hereof, with the understanding that I
offer these changes as if still under oath.

KUNAL KAMLANI

Subscribed and sworn to on the _____ day of
_____, 2019, before me,

Notary Public, in and for the State of
